No. 95-1340

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

HUGHES AIRCRAFT COMPANY,
Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

Petitioner Hughes Aircraft Company ("Hughes") asks this Court to review an interlocutory court of appeals decision remanding two claims for a trial on the merits. In a brave show, Hughes proffers no less than five circuit conflicts and three constitutional questions to support its dubious request. But as we show, in the end all that petitioner can muster is a disagreement between the Second and Ninth Circuits on one, technical statutory issue —an issue so narrow that it has arisen only once before in the ten-year history of the statute and that is not necessarily determinative even here. That, we submit, falls well short of a sufficient justification for invoking this Court's authority.

I. THE RETROACTIVITY ISSUE

Prior to October 27, 1986, the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* (the "FCA"), precluded courts from exercising jurisdiction over private enforcement (or "*qui tam*") actions where the action was "based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1983 ed.) (repealed 1986). In the False Claims Amendments Act of 1986 (the "1986 Amendments"), Congress relaxed this jurisdictional bar by making the "public disclosure" of the information in question—rather than mere government *possession* of that information—presumptively determinative of jurisdiction.[1]

Because the instant action was filed in 1989, almost three years after the 1986 Amendments were enacted, the Ninth Circuit decided the jurisdictional issue Hughes raised by applying those Amendments and sustaining jurisdiction here, even though the alleged false claims that give rise to this action were made before 1986. Hughes claims that there is a conflict in the circuits on the application of the 1986 Amendments' jurisdictional provisions in these circumstances. Petition ("Pet.") at 9.

This "conflict" is illusory: the decision below represents a straightforward application of this Court's comprehensive restatement in *Landgraf v. USI Film Products*, —— U.S. ——, 114 S. Ct. 1483 (1994), of the rules governing the effect of intervening changes in the law; and the one decision asserted to be in conflict with the decision below predates *Landgraf*, does not accord with

[1] The 1986 Amendments provide in pertinent part:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media unless . . . the person bringing the action is an original source of the information. [31 U.S.C. § 3730(e)(4)(A).]

the *Landgraf* method of analysis, and therefore is no longer authoritative. Quite aside from that, the question Hughes raises has, with the passage of time, become all but academic.

1. Prior to *Landgraf*, this Court had ventured what *Landgraf* termed "seemingly contradictory statements" as to the effect of intervening changes in the law. 114 S. Ct. at 1496. The Court had "noted the 'apparent tension'" but had "found it unnecessary . . . to resolve that seeming conflict" in pre-*Landgraf* cases. *Id.* (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990)).

In *Landgraf* the Court offered a clear synthesis of its prior decisions. Where a "new provision attaches new legal consequences to events completed before its enactment," that provision will not be applied retrospectively "unless Congress ha[s] made clear its intent" to do so. *Id.* at 1499. But where—as, for example, with "[c]hanges in procedural rules," *id.* at 1502—a new statute does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," *id.* at 1505, it is entirely appropriate to apply the new law to cases brought after its enactment, "even though that law was enacted after the events that gave rise to the suit." *Id.* at 1501.

Landgraf makes explicit that changes in jurisdictional rules, such as those worked by the 1986 Amendments at issue here, fall squarely within the latter category:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. . . . We have regularly applied intervening statutes conferring or ousting jurisdiction, *whether or not jurisdiction lay when the underlying conduct occurred*[.] . . . Present law normally governs in such situations because jurisdictional statutes "speak to the power

> of the court rather than to the rights or obligations of the parties." *Republic Nat. Bank of Miami v. United States*, 506 U.S. [80], 113 S. Ct. [554,] 565 [(1992)] (Thomas, J., concurring). [*Id.* at 1501-02 (emphasis added).]

The Ninth Circuit's application of present law to determine jurisdiction here thus represents the most straightforward of applications of *Landgraf*.[2]

2. Because *Landgraf* "signalled a significant shift in the manner in which federal courts should analyze questions involving the application of new civil statutes to conduct that has already occurred," *Lindenthal*, 61 F.3d at 1407, it is clear that the Sixth Circuit's pre-*Landgraf* opinion in *United States v. TRW, Inc.*, 4 F.3d 417 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994), on which petitioner bases its conflict-in-the-circuits claim, does not create a true conflict with the decision below.

TRW does not so much as discuss the question that the Court in *Landgraf* held to be critical to the analysis: namely, whether the new FCA jurisdictional provisions "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 114 S. Ct. at 1505. Rather, the *TRW* court seized on one branch of the pre-*Landgraf* law and assumed that because the 1986 Amendments "expand the circumstances under which citizens may bring false claims suits," the Amendments "are not retroactive." 4 F.3d at 422-23. Because the *TRW* court failed to anticipate *Landgraf*, no appellate or district court has followed *TRW* since *Landgraf*, and no court is likely to do so.[3]

[2] As the Ninth Circuit explained in *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995), *cert. denied*, —— S. Ct. ——, 64 U.S.L.W. 3639 (Mar. 25, 1996) (No. 95-1167), which the court below followed, the provision at issue here "fits this [the *Landgraf* jurisdictional] paradigm precisely: [the provision] does not impair any rights [defendant] had when it acted, nor did the provision increase [defendant's] liability for past conduct, or impose new duties"; rather it simply eliminated "a jurisdictional defense to an action brought by a qui tam relator, as opposed to an action brought directly by the government." *Id.*

3. Apart from this, the question of the effect of the 1986 Amendments on pre-1986 false claims is, at this late date, all but certainly a purely academic one. The FCA has a six-year statute of limitations which can be tolled, but cannot be extended beyond ten years. 31 U.S.C. § 3731(b). By the time this Court could render a decision in this case, all pre-Amendments false claims would be more than ten years old, and any new FCA suit based upon such claims would be time barred.

II. THE PUBLIC DISCLOSURE ISSUE

Under the 1986 Amendments, an FCA suit is jurisdictionally barred if (1) there has been "public disclosure" of the underlying allegations or transactions in, *inter alia*, an "administrative . . . report, hearing, audit or investigation"; (2) the suit is "based upon" such public disclosure; and (3) the relator was not "an original source of the information." 31 U.S.C. § 3730(e)(4)(A). Hughes claims that "the courts of appeals are divided" in their manner of applying the first part of this three-part test, *viz.*, the part pertaining to "public disclosure." Pet. at 11. As we proceed to show, except with respect to one narrow and highly technical question, Hughes is mistaken.

1. Hughes first claims there is a conflict between the circuits as to whether an "administrative report" that is "available" under the Freedom of Information Act

[3] The first post-*Landgraf* decision, *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 907 F. Supp. 1349 n.4 (N.D. Cal. 1995), expressly declined to follow *TRW* because it found the decision no longer authoritative in the wake of *Landgraf*. The only other court, other than the Ninth Circuit, to face the issue post-*Landgraf*, *United States ex rel. Milam v. Regents of Univ. of Cal.*, 912 F. Supp. 869, 881 (D. Md. 1995), simply ignored *TRW*.

("FOIA"), 5 U.S.C. § 552, is, solely by virtue of that fact, "publicly disclosed" within the meaning of the FCA —"regardless of whether a member of the public *actually* requests and receives" that report. Pet. at 16-17 (emphasis in original). Hughes claims that *United States ex. rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991), which was followed in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1992), *cert. denied*, 508 U.S. 973 (1993), answered that question in the affirmative and thus conflicts with the Ninth Circuit's decision below. Hughes is mistaken.

To begin with, neither *Stinson* nor *Kreindler* involved, or even discussed, the question of "availability" under FOIA. In each case, the public disclosure question arose because, in the course of civil discovery in a suit which had antedated the FCA action, there had been an *actual* disclosure of certain documents, and the relators in the subsequent FCA suit (who were the counsel in the prior case) had based their FCA suit on the information that had come to their attention through those disclosed documents. The issue in those cases was whether such *actual* disclosure of documents to a party in the course of discovery—but not otherwise—constitutes "public disclosure" within the meaning of the FCA. Each court answered that question in the affirmative.

Neither *Stinson* nor *Kreindler* so much as hints that the result would have been the same were the documents at issue merely *discoverable* rather than actually *discovered*, *i.e.*, if the documents had been placed in a file and would have been *subject to disclosure* in the event of a hypothetical discovery request. To the contrary, the *Stinson* court specifically stated:

> We have given a practical, commonsense interpretation to "public disclosure," one that distinguishes between *information hidden in files* or disclosed in private and *information produced* pursuant to the discovery process which is presumptively, absent a court order, available for filing and general use. [*Id.* at 1161 (emphasis added).][4]

Stinson and *Kreindler* thus do not stand for the proposition that documents are "publicly disclosed" merely because they may (or may not) be available under FOIA, or in discovery. Indeed, such a rule would be unworkable as a practical matter since, given FOIA's multiple exemptions, *see* 5 U.S.C. § 552(b), it cannot be determined that a document is "available" under FOIA unless and until a member of the public actually "requests and receives" the document. Moreover, Hughes' "potential availability" theory is thoroughly at odds with the 1986 Amendments, whose very premise is that, because "government possession" of information about a fraud does not adequately ensure that the fraud will be redressed, such possession cannot, without more, jurisdictionally bar a *qui tam* suit. The Ninth Circuit's rejection of petitioner's potential availability theory—and the court's insistence on an actual disclosure—thus creates no discord in the circuit court law.

2. Hughes is thus left with but one sub-issue, pertaining to when an actual disclosure becomes a "public" dis-

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[4] The court in *Stinson* did hold that *one* of the reasons that the disclosure of documents pursuant to the discovery request at issue there was a "public" disclosure was that the disclosure was to "a party who [was] not under any court imposed limitation as to its use" and that the documents were therefore "potentially accessible to the public." 944 F.2d at 1158. Hughes seizes on the phrase "potentially accessible to the public" to argue that this was the *Stinson* court's *entire* test for "public disclosure." In fact, however, the court held that the documents had to meet *two* separate conditions: *first*, the documents had to be *disclosed to a member of the public* prior to the time of the *qui tam* suit; and, second, the documents had to be disclosed under circumstances in which (unlike in the case, for example, of a disclosure covered by a protective order) *other* members of the public could also have lawfully obtained and made use of the documents. By ignoring the first condition, Hughes misconceives the *Stinson* court's holding.

closure, on which there is disagreement in the lower courts. The Second Circuit in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322 (2d Cir. 1992), held that a disclosure of information limited to the employees of a contractor that has been implicated in wrongdoing constitutes a public disclosure, as long as the disclosure is made to "innocent" employees, *i.e.*, employees who had not previously been aware of the facts disclosed. The court below disagreed, ruling that it would be inconsistent with Congress' purpose of encouraging employees and other "insiders" to come forward with such information to hold that a disclosure of the documents to the contractor's employees raises the jurisdictional bar to subsequent *qui tam* actions. Appendix ("App.") at 11a.[5]

The Ninth Circuit's ruling on this point will be determinative of FCA jurisdiction only in an exceedingly narrow class of cases: those in which (i) evidence of false claims is disclosed to employees of a contractor whose billings to the government are at issue; (ii) the employees to whom disclosure is made are "innocent" employees with no prior knowledge of the facts disclosed; (iii) no other disclosure occurs; (iv) suit is brought based upon the disclosure to the innocent employees; and (v) the relator is not the original source of the allegations.

[5] The Ninth Circuit reasoned as follows:

> Unlike others who come across information related to fraud, an "innocent employee who comes forward with allegations of fraud by the employer knows that her job may be in jeopardy." *Doe*, 960 F.2d at 325 (Walker, J., dissenting). Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure. [App. at 9a.]

Applying that reasoning here, the court held that the disclosure of the audit reports to certain employees of Hughes and of Northrop Corporation, the prime contractor on Hughes' B-2 project, was not a "public disclosure," because the allegations in the report could "reflect negatively" on Hughes and Northrop. App. at 9a.

It is not even clear whether the instant case falls within this class and hence whether the "innocent employee" issue is dispositive even in this case: because the appellate court held that the disclosure of the audit reports to innocent employees was not "public disclosure," it did not reach plaintiff's alternative contentions that his suit was not "based upon" any such disclosure; and that he is an "original source" of the information in the reports. App. at 14a.

Be that as it may, it suffices for present purposes that the difference between *Doe* and the decision below is on a highly technical issue of statutory construction under a federal law which, according to Hughes' own admission, *see* Pet. at 7, has generated, on average, only about 100 cases per year. The significance *vel non* of this issue is perhaps best measured by the fact that, so far as we are aware, *Doe* and the instant case are the *only* two cases, in the decade since the 1986 Amendments were enacted, in which the issue of "innocent employee" disclosure has been decided.[6]

Should this issue somehow assume greater importance in the future, there will be time enough then for this Court to decide the question, including even in *this* case once a final judgment is entered. At this time, however, there plainly is no reason for this Court to grant certiorari to decide this issue.

III. THE "INJURY TO THE PUBLIC FISC" ISSUE

After sustaining its jurisdiction in this case, the court of appeals held that there was a genuine issue of material

[6] In an effort to make the issue appear worthy of this Court's review, Hughes claims that the court below held that, in order for a disclosure to qualify as a "public disclosure," the disclosure must be to "the public at large." Pet. at 12 (internal quotations omitted). *See also* Pet. at 13 (claiming that court below held that disclosure must be to the "*general* public" in order to qualify) (emphasis in original). Tellingly, Hughes does not cite to the opinion below when it makes these assertions, because nothing in the opinion supports them.

fact as to whether Hughes, in securing payment for its work on developing radar for the B-2 aircraft, had adequately disclosed (1) to Northrop Corporation, the prime contractor on the B-2, and (2) to the government in its disclosure statement, Hughes' method of allocating costs as between its cost-plus contract with Northrop and its fixed-price contract with McDonnell-Douglas for developing radar for the F-15 aircraft. Because these inadequate disclosures "creat[ed] a substantial issue as to the reasonableness of allowing the . . . charges," App. at 19a, and "may have rendered the costs unallowable," *id.* at 25a, the appellate court held that there was a triable issue as to whether the claims that Hughes had submitted for payment were "false claims" within the meaning of the FCA for which Hughes would be liable for a civil penalty of $2,000 plus "an amount equal to 2 times the amount of damages the Government sustains." 31 U.S.C. § 3729 (1983 ed.).[7]

The court of appeals went on to state that although Hughes' "noncompliance" with the disclosure require-

[7] Hughes dedicates two pages of its petition to challenging the Ninth Circuit's ruling that plaintiff's submission, in its opposition to Hughes' summary judgment motion, of materials establishing the inadequacy of Hughes' disclosure statement should have been "treat[ed] . . . as a request to amend the pleadings." App. at 22a-23a. But Hughes has not even stated the issue as one of its "Questions Presented," nor is the issue fairly encompassed within any of those Questions. *See* Pet. at (i). Thus, the issue is not properly before the Court. *See* Supreme Court Rule 14.1(a).

In any event, the Ninth Circuit's holding on this point is consistent with hornbook law and the law of other circuits. *See* 6 J. Moore, *Moore's Federal Practice* ¶ 56.10 (2d ed. 1988) & cases cited therein ("it is often . . . desirable to treat the pleading as though it were amended to conform to the facts set forth in the affidavits" in opposition to a summary judgment motion). And the statement in the principal Seventh Circuit case on which Hughes relies to claim a conflict, *Pritchard v. Rainfair, Inc.*, 945 F.2d 185, 191 (7th Cir. 1991), has been subsequently repudiated by that very court as erroneous dicta. *See Teumer v. General Motors Corp.*, 34 F.3d 542, 547 (7th Cir. 1994).

ments may have "had an 'immaterial impact' on costs, the lack of a determination of actual harm from the . . . violation does not preclude a claim under the FCA." App. at 25a. Hughes takes issue with this statement, and, once again, mistakenly claims that the Ninth Circuit created a conflict.[8]

1. As Hughes ultimately concedes, the law is clear "that the Government"—and hence a *qui tam* relator standing in the shoes of the Government—"need not prove 'actual' or 'specific' damages to recover under the FCA." Pet. at 21. That conclusion is compelled by this Court's decision in *Rex Trailer Co. v. United States*, 350 U.S. 148, 152-53 & n.5 (1955), holding under a statute that the Court called "essentially the equivalent of" the FCA that "the fact that no damages are shown is not fatal."[9]

At the same time, to be actionable under the FCA a false submission must cause some "injury" to the Government. *United States v. Halper*, 490 U.S. 435, 445-46 & n.6 (1989). *Halper* makes clear that the concept of "injury" is broader than "damages" and includes such elements as the "investigative . . . costs" caused by a false statement or even the intangible injury to the integrity of a government program. *Id.*

Injury of the type required by *Halper* is plainly present here, since, *inter alia*, Hughes' violation of federal

[8] In the proceedings before the Ninth Circuit, Hughes did not raise at any time the issue of whether harm to the government is an essential element of an FCA cause of action. The issue was not even raised in its petition for rehearing before that court.

[9] The courts of appeals have had no difficulty in concluding, based on *Rex Trailer*, that damages need not be proven to recover under the FCA. *See United States v. Hughes*, 585 F.2d 284, 286 n.1 (7th Cir. 1978); *United States v. Ridglea State Bank*, 357 F.2d 495, 497 (5th Cir. 1966); *Fleming v. United States*, 336 F.2d 475, 480 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965); *United States v. Tieger*, 234 F.2d 589, 590 (3d Cir. 1956), *cert. denied*, 352 U.S. 941 (1956).

accounting disclosure regulations forced the government to undertake a lengthy investigation, App. at 3a, and, as the Court of Appeals specifically noted, may have resulted in the payment of unreasonable or even unallowable claims. *Id.* at 19a, 25a. The court of appeal's dictum to the effect that it was not necessary to prove "actual harm" (in the form of an "impact on costs" charged to government contractors) in no way suggests that the court below intended (or could have intended) to dispense with the "injury" requirement.

2. Of the cases on which Hughes premises its claim of a conflict, only one even dealt in any way with the "injury" requirement.

In *United States v. Azzarelli Constr. Co.*, 647 F.2d 757 (7th Cir. 1981), the false claims were made to a state agency and affected how much the state paid those making the claims, but had no conceivable impact on the federal government, because the federal obligation was fixed regardless of the state's costs. For that reason, the Seventh Circuit dismissed the action. In so doing the Seventh Circuit reaffirmed "the need to establish an injury," *id.* at 762, but went so far as to suggest that this requirement can be met if a false statement "is *capable* of causing an injury to the funds or property of the United States if the claim is in fact paid." *Id.* at 759 (emphasis added). The instant case thus presents a far stronger case of "injury" than did *Azzarelli*, and there is no basis for Hughes' claim of a conflict between the two.[10]

[10] The other cases that Hughes claims to be in conflict with the decision below are even less on-point than *Azzarelli*. In *United States v. American Heart Research Found., Inc.*, 996 F.2d 7 (1st Cir. 1993), the defendant fraudulently paid the government less postage than the government was due; the court dismissed the suit not because the government was not injured by the fraud (it plainly was), but because, under the pre-1986 version of the FCA that governed the claims at issue there, *underpaying*—as opposed to *overcharging*—the government was not defined to be an actionable "false claim." *Id.* at 8. In *United States ex rel. Glass v. Medtronic, Inc.*, 957 F.2d 605 (8th Cir. 1992), the court held that the defendant did not violate any regulations, make any false statements, or do anything else wrong; thus, the court never even *reached* the issue of damage or injury.

IV. THE CONSTITUTIONAL QUESTIONS

While claiming that the statutory issues here are determinative and that this case presents no occasion for deciding any constitutional question, Hughes also contends that the decision below upholding the constitutionality of the *qui tam* provisions of the FCA raises no less than three "constitutional questions of the first order." Pet. at 22. Yet again, Hughes is mistaken.

As this Court observed over fifty years ago, "Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943) (citations and internal quotations omitted). The validity of such statutes has long been assumed; indeed in *Marcus* this Court stated, albeit in dictum, that "Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it." *Id.* at 542.[11]

Until recently, no one had so much as questioned the constitutional validity of such statutes. In the past few years, however, it has become standard fare in FCA actions for the defendant to assert that the *qui tam* provisions are unconstitutional.

Such a claim was first raised in *Kreindler*, *supra*, and was unanimously rejected by the Second Circuit. The

[11] *See also Adams v. Woods*, 6 U.S. (2 Cranch) 336, 340 (1805) (Marshall, C.J.) (ruling on the merits of a *qui tam* action without questioning the Article III power to do so); *Marvin v. Trout*, 199 U.S. 212, 225-26 (1905) (rejecting substantive due process challenge to a state law requiring owner of gambling establishment to pay forfeiture to person not injured by the gambling, because to do so "would be in effect to hold invalid all legislation for providing proceedings in the nature of *qui tam* actions").

constitutionality of the *qui tam* provisions was next raised in the Ninth Circuit in *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994). *Kelly*, also a unanimous decision, rejected precisely the arguments raised by Hughes here.[12] This Court denied certiorari in *Kelly* on February 22, 1994. 114 S. Ct. 1125.

Since the constitutional issues petitioner tenders here are the very same issues that were raised in *Kelly*, the Ninth Circuit, in its opinion below, decided those issues here on the basis of its earlier decision in *Kelly*. The only relevant event since the denial of certiorari in *Kelly* is that two additional circuits have joined the Second and Ninth Circuits in upholding *qui tam* provisions. *See United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994) (FCA); *United States ex rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208, 1213 (7th Cir. 1995) (1832 statute pertaining to contracts with Indians). Hughes' assertion that the constitutional issues "remain[] unsettled," Pet. at 22, is thus made up out of whole cloth.[13]

[12] *Kelly* disposed of the separation-of-powers issue on the basis of *Morrison v. Olson*, 487 U.S. 654 (1988), reasoning that the Justice Department's ability to take over and dismiss a relator's suit, *see* 31 U.S.C. § 3730(c)(2)(A), gives the Executive Branch far greater control over *qui tam* relators than over the independent, court-appointed prosecutors whose authority was upheld in *Morrison*. *Kelly* found *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890), dispositive of the Appointment Clause issue, as that case teaches that a person having a position "without tenure, duration, continuing emolument or continuous duties" is not an "Officer of the United States" within the meaning of the Appointments Clause. And *Kelly* found no Article III defect when the government effectively assigns its claims to *qui tam* plaintiffs who, by virtue of the bounty they can recover, have a personal stake in the outcome. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992) (finding that plaintiff lacked standing, but distinguishing "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[13] Lacking support in any of the decided cases, petitioner strains to rely on a memorandum written in 1989 by then-Assistant Attorney General William P. Barr urging the Attorney General to challenge the constitutionality of the *qui tam* provisions of the FCA. *See* Pet. at 22-23. The relevance of this memorandum escapes us, especially since (1) Attorney General Thornburgh, to whom the memorandum was addressed, did not accept the recommendation and thus the Justice Department at that time took no position on the constitutionality of the provisions at issue here; (2) the memorandum itself states that agencies within the Justice Department at that time were of two minds and that then-Solicitor General Kenneth W. Starr was of the view that the *qui tam* provisions *are* constitutional; and (3) the Justice Department has subsequently resolved that internal division and concluded that the provisions are constitutional. *See* Brief for Intervenor United States of America in *United States ex rel. Pitt v. FD Services, Inc.*, No. 94-2496 (4th Cir.) (pending).